

No. PD-0748-17

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS
FILED
COURT OF CRIMINAL APPEALS
1/25/2018
DEANA WILLIAMSON, CLERK

KELSEY JO LACKEY § COURT OF APPEALS NO.
 § 10-17-00016-CR
V. §
 § DISTRICT COURT NO.
THE STATE OF TEXAS § 13-04695-CRF-272

STATE'S OBJECTION/MOTION TO STRIKE
REPORTER'S RECORDS ATTACHED TO APPELLANT'S BRIEF AND TO
THE FILING OF ANY REPORTER'S RECORD WITH THE CLERK OF THE
COURT OF CRIMINAL APPEALS

COMES NOW, the State of Texas, by and through its Assistant District Attorney, Douglas Howell, III, and respectfully objects and moves to strike reporter's records attached to Appellant's Brief and to any filing of a reporter's record with the Clerk due to the fact that a reporter's record was not filed when the court of appeals issued its decision.

The State would show in support of her objection/motion that:

1. On March 20, 2017, the Tenth Court of Appeals dismissed the appeal in case no. 10-17-00016-CR because the "amended certificate of right to appeal indicates this is a plea bargain case and that Lackey waived his right to appeal. TEX. R. APP. P. 25.2(d)." *Lackey v. State*, 2017 WL 1148239, at *1 (Tex. App.—Waco March 20, 2017). Discretionary review was granted November 1, 2017. Appellant's brief was filed December 4, 2017. The State's Brief was filed January 22, 2018.
2. On January 24, 2018, Appellant issued a letter instructing a court reporter to file an eight-volume reporter's record with this Court. A copy of this letter (attached) was filed with this Court same day. **In the letter, Appellant acknowledges that "the Waco Court dismissed the appeal before the reporter's record was filed."** (emphasis added).

Thus, the court of appeals did not review any reporter's record when it issued its opinion.

3. Under *Booth v. State*, 499 S.W.2d 129, 135 (Tex. Crim. App. 1973), an appellate court is not authorized to consider documents attached to an appellate brief which are not part of the record.
4. In addition to his letter instructing the court reporter to file eight volumes of reporter's records, Appellant has attached reporter's records to his brief that were not part of the record from which the court of appeals based its decision: Appellant's Brief – Appendix, Tabs 1, 2 & 3.
5. The State objects and moves to strike the filing/consideration of any documents that were not part of the record when the court of appeals issued its opinion. This objection/motion includes reporter's records that are either attached as an appendix to Appellant's brief or e-filed by a court reporter.
6. The State notes that it has repeatedly cited to *Booth, supra*, and objected to Appellant's citation to documents that were not part of the record during the course of this appeal:
 - State's Response To Appellant's Motion For Rehearing, case no. 10-17-00016-CR (included in Clerk's Record filed with the Court of Criminal Appeals), p. 3, fn. 3.
 - State's Reply To Appellant's Petition For Discretionary Review, pp. 3-5.
 - State's Brief, p. 3, fn. 1.

PRAYER

The State objects and moves to strike the attachment of, or any filing of, a reporter's record and requests that the Court only consider the Clerk's Record that was before the Tenth Court of Appeals when it issued its opinion.

Respectfully submitted,

/s/ Douglas Howell, III

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CERTIFICATE OF SERVICE

I, Douglas Howell, III, do hereby certify that a true and correct copy of the above State's Motion for Extension of Time to File State's Brief was emailed to:

- E. Alan Bennett at abennett@slm.law
- State Prosecuting Attorney at information@spa.texas.gov

on this the 25th day of January, 2018.

/s/ Douglas Howell, III

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January 24, 2018

Denise C. Phillips **via email: denisecphillips@gmail.com**
272nd District Court
300 East 26th Street, Ste. 400
Bryan, Texas 77803

Re: No. 13-04695-CRF-272; State of Texas v. Kelsey Jo Lackey; In the 272nd District
Court of Brazos County

No. PD-748-17; Kelsey Jo Lackey v. State of Texas; In the Court of Criminal
Appeals of Texas

Dear Ms. Phillips:

I was retained to represent Kelsey Jo Lackey in the above-referenced appeal.

You prepared an 8-volume reporter's record for filing with the Waco Court of Appeals in Cause No. 10-17-00016-CR at the request of Mr. Lackey's former appellate counsel, Mr. Chad Van Brunt. However, the Waco Court dismissed the appeal before the reporter's record was filed. Since then, the Court of Criminal Appeals has granted review.

Please file the reporter's record with the Court of Criminal Appeals at your earliest opportunity.

I believe that Mr. Van Brunt paid you for preparation and filing of the record, but if any additional fees are owed, please let me know and I will take care of them.

Thank you in advance for your prompt attention to this matter. If you have any questions or concerns, please do not hesitate to contact me.

Very truly yours,

/s/ Alan Bennett
E. Alan Bennett

xc: Douglas Howell, III (via e-service)
Marc Hamlin, District Clerk (via e-file)
Kaetheryne B. Kyriell (via e-mail)